BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Calling Party Pays Service Offering	)	WT Docket No. 97-207
in the Commercial Mobile Radio Services	)	

COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Comments in the above captioned proceeding.[2] CTIA supports the Commission's ruling to treat Calling Party Pays ("CPP") as a CMRS service, and its adoption of the Notice to remove regulatory barriers to the provision of CPP services.

I. INTRODUCTION AND SUMMARY

The Notice correctly reflects the role that the Federal government should play in a competitive market; the Commission's primary objective should be the removal of unnecessary regulatory obstacles that impede the growth of competitive telecommunications services. CTIA applauds the Commission's declaratory ruling to treat CPP offerings as CMRS. Not only is this the correct legal decision, but as a

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

2 In the Matter of Calling Party Pays Service Offering in the Commercial Mobile Radio Services, *Declaratory Ruling and Notice of Proposed RuleMaking*, WT Docket No. 97-207, FCC 99-137 (rel. July 7, 1999) ("Notice").

matter of policy, it will assist greatly in removing potential and actual regulatory obstacles to CPP development created by the states. CTIA requests that the Commission expand the classification of CPP services it considers CMRS to include those CMRS calls that involve differing means of compensating carriers for charges associated with the CMRS call.

CTIA also congratulates the Commission on its additional proposals to remove regulatory obstacles to the introduction of CPP services. The Commission's identified goal in this proceeding is to help ensure that the success or failure of CPP to reach its potential reflects the commercial judgments of service providers and the informed choices of telecommunications consumers, rather than unnecessary regulatory or legal obstacles and uncertainties. [3] CTIA shares the Commission's goal and has identified in its Comments several such regulatory obstacles that should be removed.

There are numerous potential competitive benefits associated with CMRS carrier provision of CPP. This is why CTIA has been such a vocal champion of CPP, and requested that the Commission promptly release a notice of proposed rulemaking to address the regulatory issues associated with CMRS carrier provision of CPP services.[4] By removing artificial obstacles to the development of this form of CMRS, the Commission rightly will permit market forces to determine what form, if any, CPP services will take. CPP service offerings ultimately may help to spur local loop competition, especially for residential consumers. CPP services may enhance CMRS carrier penetration and appeal to different segments of consumers, including those with limited incomes. In fact, CPP services combined

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[3] Notice at ¶ 1.

[4] Petition for Expedited Consideration of the Cellular Telecommunications Industry Association in WT Docket No. 97-207 (filed Feb. 23, 1998).

with prepaid calling plans may prove a viable telecommunications alternative to those parties who may otherwise be disenfranchised. Of course, these positive distributional effects will not occur if there are unnecessary regulatory constraints on CMRS carrier provision of CPP services.

Consistent with a market-based approach, CPP should be considered a voluntary service offering subject to minimal regulatory intrusion. Leave it to the market to determine who provides CPP and under what conditions. The Commission's role is important, but limited. The Commission should move forward on several of its proposals to facilitate consumer preference and to remove remaining regulatory obstacles to CPP development. This means adopting a uniform, nationwide notification mechanism that informs callers that they will be charged to complete the CPP call. Necessarily, this notification mechanism must be free from fragmented regulation by the states. Moreover, the Commission must ensure that carriers have binding, enforceable obligations with the calling parties.

Notably, the Commission also must refrain from adopting several of the Notice's proposals that are unnecessary or unworkable. The Commission need not at this time contemplate the disclosure of specific rates in the notification message. Similarly, it need not contemplate regulating the rates that CMRS carriers charge CPP callers. Moreover, it need not require incumbent local exchange carriers ("ILECs") to provide billing and collection services. Given the (1) lack of evidence that carriers will engage in inappropriate or discriminatory conduct; (2) the ready availability of targeted enforcement mechanisms; and (3) the potential that such regulation may impair market development, the Commission should refrain from adopting these proposals at this time.

The Commission need not regulate CPP in this manner to avoid a repeat of the problems with gouging experienced in recent years in the payphone industry. With calls from payphones, neither the

calling nor the called party necessarily has a pre-existing relationship with the operator services provider ("OSP").

By contrast, with CPP the called parties have an ongoing service relationship with the CMRS provider that gives them the ability to object to and otherwise influence the rate charged by the CMRS provider for incoming calls. In all likelihood, the called party will be concerned if a calling party is overcharged. The Commission should not underestimate the CMRS subscribers' predilections toward calling parties or their ability to ensure (through their continued patronage) that CPP charges remain competitively priced.

To the extent that the Commission harbors concerns, it should abandon its more intrusive proposals in favor of less restrictive alternatives such as carrier branding of CPP service. Through branding, carriers' investment in the goodwill associated with their brand name will provide a strong incentive to price fairly. In this way, the Commission will ensure that the CMRS CPP market functions appropriately with minimum regulatory intervention.

II. CPP HAS THE POTENTIAL TO PROVIDE A NEW SEGMENT OF THE U.S. MARKET WITH ACCESS TO WIRELESS TELECOMMUNICATIONS SERVICES.

CTIA shares the Commission's enthusiasm about the potential of CPP services to provide increased accessibility of wireless services to U.S. consumers. By altering the payment obligation, CMRS providers can achieve positive distributional effects. As explained in the Notice:

> the potential exists in the U.S. for the wider availability of CPP offerings to benefit the development of local competition and to provide an important new alternative to consumers who have not previously used CMRS extensively. Our goal in this proceeding is to help ensure that the success or failure of CPP offerings to reach this potential reflects the commercial judgments of service providers and the informed choices of

> consumers, both wireless and wireline, rather than unnecessary regulatory or legal obstacles and uncertainties. [5]

Chairman Kennard recognized the potential of CPP earlier this year noting that CPP "has the potential to make wireless services available to a whole new category of consumers: families on tight budgets who cannot afford mobile phones today, people who would otherwise turn off their phones to avoid having to pay for incoming calls, and students in college."[6]

The Commission's optimism is well-founded. The international experience with the increased accessibility to telecommunications services through CPP is positive. For example, CPP has opened up telecommunications service to populations in Latin America who never had a choice or a chance to use landline service. In Columbia, CPP service options assist '"those in the lower socioeconomic tiers of the population because it's cheaper and allows for cost control."'[7] Customers in Columbia can receive an unlimited number of phone calls for a low monthly price; '"[e]mployers can communicate with out-of-the-office staff, farmers with their workers in the field, and parents with their children, without worrying about high phone bills."'[8]

CPP has the ability to empower consumers. It places decision-making responsibility and control within the hands of consumers -- both calling and called parties. Wireless subscribers who choose to subscribe to CPP using Advanced Intelligent Network ("AIN") technology will have several

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5 Notice at ¶ 1.

6 See Press Statement of Chairman William E. Kennard on "Wireless Day," (June 10, 1999) (located at <http://www.fcc.gov/commissioners/kennard/states.html>).

7 Sandra Welfeld, "Columbia: One-Way Cellular Service Rings Up Niche Customers," Radio Comm. Report (Sep. 14, 1998) ("CPP in Columbia ").

options, including: (1) designating a PIN code which the called party can distribute to preferred callers, to permit call completion without the calling party being billed; (2) designating a pre-selected group of preferred phone numbers from which the called party will accept air-time charges and pay for calls, or (3) relying on a toggle capability by which the called party can turn-on or turn-off the CPP function.[9] CPP can also expand the universe of numbers calling parties can call because it will serve as an incentive for the publication of mobile numbers, thereby enabling calling parties to reach telecommunications subscribers at both landline and mobile numbers. Calling parties will be better-informed decision-makers, responding to rational economic signals.

As an added benefit, CPP in combination with prepaid cellular service ensures that customers do not have to contend with "huge phone bills".[10] The Commission is already aware of the numerous benefits associated with prepaid CMRS services. As explained by Commissioner Powell:

> the Commission [in previous decisions has] expressed its concern that competition would not serve certain areas or segments of the population, because facilities-based carriers were concerned only with high-end users and business customers. Yet, we see [prepaid] wireless offerings springing up that are marketed to less affluent segments of the population. These plans are marketed to mass audiences on television, radio and billboards. In fact, I was in a 7-11 the other day and noticed that right there in the store one could purchase a prepaid cellular plan and wireless phone! The market has found a new and creative approach to serving areas and populations that we suggested would not be served well by competition. Never sell the market short.[11]

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8 Id.

9 See CTIA, "The Who, What and Why of Calling Party Pays," at 7-8 (July 4, 1997).

10 See CPP in Columbia, supra.

11 Remarks by Commissioner Michael K. Powell, Federal Communications Commission, Before PCS '98, Orlando, Florida, 3-4 (Sep. 23, 1998) (as prepared for delivery).

Just as prepaid cellular can assist those consumers with budgetary constraints and credit issues, so too can the introduction of CPP services. Of course, the positive distributional effects of CPP services and other potential benefits will never be realized if the Commission preserves or erects additional regulatory obstacles to CPP development.

III. THE COMMISSION SHOULD LIBERALIZE ITS DEFINITION OF CPP TO INCLUDE CPP CHARGES RECOVERED THROUGH INTERCONNECTION COMPENSATION RATES.

CTIA applauds the Commission's initial declaratory ruling that CPP is a CMRS service.[12] As CTIA has noted previously, a CPP call is like other CMRS calls, but for the fact that the call is paid for by the calling party. The CPP call meets all of the requirements of a CMRS service: the service involves a mobile phone and will be commercially available to the public; the underlying call will be for-profit and interconnected with the public switched telephone network. As with collect calls, the party paying for the charge has no pre-existing customer relationship or service contract with the carrier that ultimately recoups the charges for the service. This lack of a pre-existing relationship, though, does not render a collect call a non-telecommunications service. Similarly, to classify CPP calls as merely a billing and collection service[13] would be patently inappropriate. It fails to recognize the indisputable fact that this service requires that a CMRS call be made and completed.[14]

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12 Notice at ¶¶ 8-19.

13 If CPP were considered merely a billing and collection service, it would still be a telecommunications service. Billing and collection for a call is part of any telecommunications service. Labeling CPP as a non-CMRS service merely renders Section 332, 47 U.S.C. § 332, inapplicable. This means that the states would be unable to take advantage of the explicit "other terms and conditions" reservation of authority in Section 332. The Commission, though, still would retain jurisdiction over CPP services. Therefore, it could preempt inappropriate state

While CTIA supports the Commission's declaratory ruling, it believes that the Commission should expand its definition of CMRS to include CPP calls where the charges are recovered indirectly from the caller through interconnection compensation agreements. Contrary to the Notice's preliminary conclusions,[15] if a CMRS carrier were to implement a form of "asymmetrical" compensation with a LEC as a means of recovering its airtime charges associated with a CPP call, this should not foreclose a determination that the CMRS carrier is offering a CPP CMRS service. As the Commission acknowledges, "there is no reference in the statutory definition [for CMRS] to who pays for the call."[16] Just as when the "calling party pays the airtime charges" it is considered CMRS, so too should calls that are reimbursed indirectly through an interconnection fee be considered CMRS. In either case, the call involves an interconnected, for profit call to a mobile station -- the underlying call still meets the definition of CMRS.

In the alternative, the Commission should consider such calls (in which reimbursement occurs through interconnection fees) as the "functional equivalent" to a mobile service,[17] thereby regulating such

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regulation under other provisions of the Communications Act of 1934, as amended ("Communications Act").

14 As the Supreme Court has noted in the context of the filed-rate doctrine, the setting of rates involves the provision of services and billing. American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223-224 (1998) ("Central Office").

15 Notice at ¶¶ 73-74.

16 See id. at ¶ 17.

17 See 47 U.S.C. § 332(d)(1); 47 C.F.R. § 20.3 (Commercial mobile radio service: a mobile service that is: (a)(1) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (2) an interconnected service; and (3) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) the functional equivalent of such a mobile service described in paragraph (a) of this section.").

services as CMRS offerings. As the Eighth Circuit held, Section 332 of the Communications Act[18] provides the jurisdictional basis for the Commission to establish compensation mechanisms for the transport and termination of traffic between LECs and CMRS carriers.[19] The Commission's jurisdiction pursuant to Section 332 over interconnection rates is sufficiently comprehensive to include CPP charges recovered through interconnection agreements. For this reason as well, CTIA takes issue with the Commission's definition of CPP[20] to the extent that it fails to classify those calls in which the LEC bills the caller and reimburses the CMRS carrier through interconnection compensation as CPP.

On a related note: The Commission is correct in recognizing that the current scheme for inter-carrier compensation for mutual traffic termination does not obviate the need for CPP services.[21] At this time, reciprocal compensation contracts are not designed to and do not permit carriers to recover the sum total of their costs for a CPP call. Among other things, reciprocal compensation does not cover airtime charges. Airtime is a function of a carrier's capacity -- it is not a public good. One customer's

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18 47 U.S.C. § 332.

19 Iowa Utils. Bd. v. F.C.C., 120 F.3d 753, 800, n. 21 (8th Cir. 1997), rev'd on other grounds sub nom., AT&T v. Iowa Utils. Bd., 525 U.S. 366 (1999) ("Because Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by . . . [CMRS] providers, see 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue [interconnection] rules of special concern to the CMRS providers, i.e., 47 C.F.R. §§ 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717. . .").

20 See Notice at ¶ 2 (CPP is defined as "a CMRS provider makes available to its subscribers an offering whereby the party placing the call to a CMRS subscriber pays at least some of the charges associated with terminating the call, including most prominently charges for the CMRS airtime.").

21 See id. at ¶ 71.

use of airtime forecloses other potential uses. Lack of compensation for airtime charges is problematic; carriers have opportunity costs that need to be reimbursed. Until such agreements properly compensate a carrier for its charges, they should not be viewed as an adequate substitute for CPP.

IV. BY CLASSIFYING CPP AS CMRS, THE COMMISSION EFFECTIVELY FORECLOSES CONFLICTING STATE REGULATION OF THE NOTIFICATION MECHANISMS ASSOCIATED WITH CPP OFFERINGS.

The Commission is correct in asserting its jurisdiction to adopt a uniform, national notification method for CPP CMRS. As it acknowledges, its primary mission under the Communications Act is to regulate "interstate and foreign communications so as to make available to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service."[22] The Commission correctly relies upon Sections 201(b) and 332(c)(3)(A) as the jurisdictional basis to implement a uniform, nationwide notification system for CPP.[23] Section 201(b) provides the Commission jurisdiction over "CMRS calls that originate and terminate in different states."[24] Section 332, in turn, commands the Commission "'to establish a federal regulatory framework to govern the offering of all [CMRS],"[25] a directive furthered by the adoption of national, uniform notification mechanisms.

The Commission's statements to date regarding CPP necessarily affect the role that states may play in regulating CPP offerings. CTIA is concerned, though, that the Commission fails to understand

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22 Id. at ¶ 36 (citing 47 U.S.C. § 151).

23 Id. at ¶ 34.

24 Id. at ¶ 36.

25 Id. (citing H.R. Conf. Rep. No. 103-213, at 490 (1993)) ("Conference Report").

the significance of its own jurisdictional statements.[26] By declaring that (1) CPP is a CMRS service;[27] and (2) it is essential to develop a uniform, nationwide notification system,[28] the Commission effectively forecloses state regulation of CPP notification mechanisms.

By operation of Section 332, the Commission's declaration that CPP is a CMRS service precludes all forms of state rate and entry regulation. To the extent that state adoption of differing notification methods affects rates and entry, it is prohibited by Section 332. Alternatively, Section 2(b) provides an additional basis for the Commission to adopt a uniform, nationwide notification mechanism free of conflicting state regulation.

A. States Are Preempted By Section 332 From Regulating The Notification Mechanisms Associated With CPP Calls.

As noted above, determining that CPP is a form of CMRS automatically means that states are preempted from imposing rate or entry regulation on it. The Commission, though, appears concerned that regulation of the CPP notification mechanism may implicate "other terms and conditions" of CPP service, thereby implicating state authority to regulate CPP. This concern is unfounded.

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26 See id. at ¶ 39 (seeking a cooperative role with the states in implementing notification mechanisms and other consumer protection issues).

27 Id. at ¶¶ 14-19.

28 See, e.g., id. at ¶ 27 ("The record strongly supports the conclusion that some effective form of calling party notification is critically important to avoid customer confusion with CMRS provider introduction of CPP offerings. Further, the comments almost unanimously indicate that without a uniform notification system, conflicting state notifications would increase consumer confusion about calls to CPP subscribers if CPP were to be implemented more widely. Another consequence of conflicting notifications would be increased costs to wireless carriers in their efforts to provide notifications to calling parties in different jurisdictions.")

As a preliminary matter, rote classification of CPP as a CMRS "term and condition" fails to resolve the issue of whether state jurisdiction is permitted by Section 332(c)(3)(A). The phrase "terms and conditions," as generally used, necessarily includes CMRS rates and entry. Indeed, Congress itself referred to CMRS rates and entry as "terms and conditions" of CMRS:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.[29]

Hence, before the Commission may determine that states possess authority over particular terms and conditions of CPP service pursuant to Section 332(c)(3)(A), it must first determine whether the terms and conditions at issue are rate- and entry-related.

The national notification mechanism for CPP service to be adopted by the Commission is inextricably linked to rate and entry regulation. CPP is designed to compensate wireless carriers for calls made to wireless customers. Conceptually, the only difference between CPP and other CMRS services is a change in the entity being charged for the call. Regulation of CPP involves the regulation of rates charged by CMRS providers for CMRS service and the manner in which those charges are assessed. In fact, the main point for providing a uniform notification message is to inform callers that they will be charged for the call. Therefore, CPP is appropriately characterized as a CMRS rate mechanism for which the Commission retains exclusive regulatory jurisdiction.

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[29] 47 U.S.C. § 332(c)(3)(A)(emphasis added). The House Report mentions the preemption of state and local regulation of CMRS rates and entry, and, again, states that "nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services." H.R. Rep. No. 111, 103rd Cong., 1st Sess. 261 (1993) (emphasis added) ("House Report").

Rate regulation necessarily encompasses review of the method of notification that a carrier employs to communicate with potential and existing customers about the underlying rates that it charges for the use of its services.[30] Traditional tariff filing requirements, a regulatory method used by both the Commission and the states, are intrinsic to rate regulation. These tariffs are designed to provide, among other things, notification of the charges for various services. As the Supreme Court has noted in the context of the filed-rate doctrine, rates "do not exist in isolation. They have meaning only when one knows the services to which they are attached."[31] A traditional administrative law understanding of rate regulation inherently includes the rate notification process. Given this understanding of rate regulation, state review of CPP rate notification methods is necessarily and significantly limited.

The legislative history of Section 332(c)(3)(A) mentions consumer protection as an interest that normally falls within the traditional "terms and conditions" properly subject to state and local regulation.[32] In the CPP context, regulation of customer notification mechanisms is more appropriately characterized

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30 As a matter of law, before a state may qualify to regulate a CMRS carrier's rates for purposes of CPP, it must petition the Commission consistent with the procedures in Section 332. Specifically, a petitioning state must prove that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory" or "such market conditions exist and such service is a replacement for landline telephone exchange service for a substantial portion of the telephone landliine exchange service within such State." 47 U.S.C. § 332(c)(3)(A).

31 Central Office, 524 U.S. at 223.

32 See House Report at 261 ("By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority.")

as rate regulation than as consumer protection because such mechanisms act as a form of market-based CMRS rate regulation.

As CTIA has noted previously, CPP notification mechanisms are intrinsically tied to CMRS rates because they facilitate the market's ability to regulate CMRS rates. While the Commission has authority to establish rates that CMRS providers charge for the use of their network in completing calls placed to wireless customers, it has determined that traditional methods of rate regulation would disserve the marketplace and that competition within the CMRS industry could be relied upon to ensure just and reasonable rates.[33] Nonetheless, CMRS rates in a CPP environment, without notification procedures, could lead to callers incurring charges of which they were unaware (and, possibly, that they would have chosen not to incur) -- resulting in predictable demands for more regulation. Notification mechanisms resolve this potential problem by informing the consumer that a charge will occur, and permitting the consumer to decide whether to incur the charge. The notification permits consumer demand to play an important part in determining rates that callers will pay to complete a call. For this reason, CPP will influence marketplace rates and thus place it within the Commission's CMRS ratemaking authority under Section 332(c)(3)(A).

Regulation of CPP can rise to the level of entry regulation, as well. Section 332's absolute ban on state entry regulation ensures that any state-created entry barriers, whether entirely or merely partially effective, whether direct or indirect, whether applicable to all CMRS services or only to

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33 See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, ¶ 175 (1994) ("there is sufficient competition in [the CMRS] marketplace to justify forbearance from tariffing requirements").

particular CMRS services, are prohibited.[34] Under no circumstances may a state impair or impede CMRS carriers from entering a market or providing CMRS service(s).

State regulation of the notification mechanism inherently comprehends state entry regulation of CPP. [35] By "agree[ing] with the commenters that a uniform nationwide notification system that would apply to all calls is necessary to facilitate the implementation of CPP,"[36] the Commission acknowledges implicitly that its national policy goals for CPP development would be at odds with those of the states if states were permitted to adopt differing notification obligations. If a state adopts a particular notification method that is contrary to or different from the national standard, it would impair a carrier's ability to offer efficient, cost-effective CPP service, or may totally bar a carrier's provision of CPP in that state.[37]

As the Notice specifically acknowledges, the main objective of this proceeding is to remove regulation (whether Federal or state) that functions as an obstacle to the development of CPP service.

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34 To illustrate in a non-CPP context, the Commission would be fully justified in preempting any state or local regulation which prohibited the offering of CMRS roaming services.

35 Alternatively, because calls provided pursuant to a CPP arrangement are telecommunications services, Sections 253(a) and (d) grant the Commission authority to preempt state bans on the use of CPP to complete CMRS calls, regardless of whether the ban involves interstate or intrastate CPP offerings. See 47 U.S.C. § 253(a)("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

36 Notice at ¶ 33; id. (The Commission also noted that based on the record, "such a notification would significantly alleviate confusion on the part of calling parties by providing them the capability to make an informed decision on whether to proceed with completing the call. In addition, as several commenters submit, a uniform nationwide standard for notification announcement would likely minimize the cost to wireless carriers of providing a notification, especially where they service multistate areas.").

The Commission has identified, among other things, the lack of a uniform, nationwide notification method as a barrier to widespread CPP development. Necessarily, any state notification mechanism, by virtue of its existence, impairs the goal of providing a uniform, nationwide notification mechanism and therefore acts as an entry barrier prohibited by Section 332.[38] If the lack of a national, uniform notification mechanism is barring CPP development, then any state regulation that conflicts with the national system is barred as a prohibited entry barrier under Section 332.

B. Section 2(b) "Impossibility" Jurisprudence Also Serves to Preempt Inconsistent Or Additional State CPP Customer Notification Requirements.

The Communications Act and the cases interpreting it provide a second basis of exclusive Commission authority over CPP customer notification mechanisms: the Section 2(b) impossibility exception. [39] Through operation of the impossibility exception, the Commission retains jurisdiction to ensure that inconsistent state regulation does not thwart uniformity of nationwide CPP notification mechanisms.

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[37] In addition, State or local government attempts to ban or delay CPP operate also are prohibited by Section 332(c)(3)(A). These bans or delaying tactics effectively restrict choices for consumers and impair nationwide service plans of CMRS providers.

[38] In other words, if the Commission believes as a matter of policy that it is necessary to adopt a national, uniform notification mechanism, then any state action to adopt a new or different notification method would result in a non-uniform, non-national notification obligation.

[39] The impossibility exception allows Commission preemption when: (1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would "negate[] the exercise by the FCC of its own lawful authority" because regulation of the interstate aspects of the matter cannot be "unbundled" from regulation of the intrastate aspects. Public Serv. Comm'n of Maryland v. F.C.C., 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations omitted).

The Communications Act's dual regulatory scheme generally provides state jurisdiction over intrastate communications and Commission jurisdiction over interstate and foreign communications.[40] However, in the event that federal and state jurisdictions overlap, "state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[41] Even a very limited interstate communications component suffices to impart Commission jurisdiction.[42]

The considerable interstate component of CPP satisfies the first prong of the impossibility exception. Calls placed to wireless subscribers clearly retain both interstate and intrastate attributes. As CTIA has noted previously, eighty-two percent of the MTA-based PCS license areas are interstate, encompassing more than 90 percent of the U.S. population, while 23 percent of the BTA-based PCS license areas are interstate, encompassing 36 percent of the U.S. population. In addition, cellular licensees' efforts to expand their footprints, either through acquisition or agreements with other carriers,

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40 See 47 U.S.C. § 152; see also Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 360 (1986).

41 Louisiana Pub. Serv. Comm'n, 476 U.S. at 374 (citations omitted); see also Computer and Communications Indus. Ass'n v. F.C.C., 693 F.2d 198, 214 (D.C. Cir. 1982) ("Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.").

42 See National Ass'n of Regulatory Util. Comm'r v. F.C.C., 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use"); see also Puerto Rico Tel. Co. v. F.C.C., 553 F.2d 694, 700 (1st Cir. 1977) ("no matter how frequently or infrequently a subscriber places interstate calls, he is entitled to have the conditions placed on access to the interstate telephone system measured against federal standards of reasonableness").

have resulted in the marketing of cellular service across state boundaries and the establishment of national footprints. Moreover, callers of wireless subscribers obviously place calls to a multitude of jurisdictions. CPP will function in tandem with a substantial number of interstate wireless calls.

Consistent with the second prong of the impossibility exception,[43] preemption of conflicting state notification mechanisms will further valid Commission objectives. The uniform growth and development of wireless services through the adoption of national, uniform notification methods, coupled with the efficient and intensive use of the spectrum, constitute valid Federal regulatory objectives that must be protected. A uniform, national method of CPP notification will promote the nationwide viability and availability of CPP free of inappropriate regulatory barriers. In turn, the greater availability of CPP should expand CMRS subscribership and encourage greater use of wireless services. This result is consistent not only with the Commission's but also Congress' goals for the CMRS industry. In revising Section 332, Congress envisioned that all CMRS providers would be subject to "uniform rules"[44] and intended "to establish a Federal regulatory framework to govern the offering of all commercial mobile services."[45]

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43 The Commission is entitled to substantial deference in identifying a valid Federal regulatory objective consistent with the Communications Act. See Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 381 (1969); see also Electronic Indus. Ass'n Consumer Electronics Group v. F.C.C., 636 F.2d 689, 695 (D.C. Cir. 1980) ("We accord the Commission broad discretion in implementing its controlling statutes").

44 See House Report at 259.

45 See Conference Report at 490 (emphasis added). See also 139 Cong. Rec. S7995 (daily ed. June 24, 1993). Congress incorporated by reference the findings of both the House bill and the Senate version. Section 402(13) of the Senate version finds that "because commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market

By contrast, if each interstate carrier is required to adopt a separate and distinctive method for CPP notification as required by state regulators, it is likely that the effort may outweigh any of the possible market benefits of the service.[46] A fractured notification policy may effectively preclude most carriers' ability to provide CPP service.

Finally, consistent with the third prong of the impossibility analysis, multiple burdensome and potentially inconsistent state customer notification requirements likely will lead to consumer confusion and raise barriers to the implementation of CPP -- effects that would negate realization of the Commission's valid federal objectives. As CTIA has explained previously, states have considered a variety of methods to provide consumers with CPP notification, including bill inserts, advertisements, unique NXX codes, 1+ dialing, and specialized tones and intercept messages. If the Commission permits each state to adopt its own CPP notification requirement, CPP rules will be fractured along state boundaries with predictable customer confusion. Given these realities, preemption by the Commission under Section 2(b) is appropriate.

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power vis-à-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest." (emphasis added).

[46] Individual state-by-state notification requirements are not only a logistical burden on interstate carriers, but they reduce the economies of scale that are realized by one national notification methodology. Whatever final notification strategy the Commission determines best satisfies the public interest, it will obviously result in an additional cost to carriers. These costs can be minimized, however, by allowing carriers to realize certain efficiencies through a national approach.

V. THE COMMISSION SHOULD ADOPT A UNIFORM, NATIONAL SYSTEM OF NOTIFICATION REGARDING CPP CALLS.

The Commission has proposed a uniform notification announcement that includes the following: (1) notice to the caller that the wireless subscriber the caller is trying to reach has elected CPP, and that the caller will be responsible for payment of airtime charges; (2) identification of the CMRS carrier; (3) the per minute rate and any other charges applicable to the call; and (4) notice that the caller has the opportunity to terminate the call prior to incurring charges.[47]

CTIA believes that the most important policy goal of any notification requirement is to provide the caller with sufficient information to decide whether to continue the call and accept charges or to terminate the call without incurring CPP charges. As demonstrated below, adoption of a uniform, national notification mechanism is essential. The Commission, though, need not regulate the notification announcement to the level of detail it has proposed. Rather, a more streamlined approach will better serve consumers and will ensure that CPP services are not inadvertently impaired by well-meaning, but ultimately harmful, regulation.

A. The Notification Mechanism Must Inform Callers That They Will Be Charged To Complete The CMRS CPP Call.

The majority of other commenters in this proceeding has registered support for a uniform, national system to notify callers that charges may be incurred for calls to wireless CPP customers. CPP will change the way consumers pay for calls to wireless subscribers. Consumers need to receive adequate, regular notice that the person called has elected a new billing arrangement with the wireless

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[47] Notice at ¶ 42.

carrier. The Commission, though, should not micromanage the notification message by dictating its exact content.

CTIA continues to support the use of a distinctive tone. CTIA also supports for a sufficient period of time, such as 18-24 months after a Commission Order, a recorded intercept message that will inform callers that they will be charged for placing a call to a CMRS subscriber electing CPP service. This notification format will ensure that the calling party is provided with sufficient information -- directly analogous to the information provided to a party before accepting a collect call -- to decide whether to continue the CPP call or to terminate without incurring a charge. This format has the advantage of not imposing undue or unnecessary requirements on the CMRS providers offering CPP service. Once callers are familiar with the notion of CPP, the notification can be simplified over time.[48] After 18-24 months of the notification message, the Commission should move to a distinctive tone.[49]

Similarly, the Commission should reject other notification methods such as unique service codes or 1+ dialing[50] as discriminatory and unworkable. CTIA questions the purported benefits of such proposals. Rather, the Commission should exercise its exclusive authority over numbering

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48 See id. at ¶ 44.

49 Distinctive tones are already used in a variety of settings and are easily understood by most consumers. For example, the "busy signal" is a common tone that is understood throughout the nation to mean that the called party is already using the telephone. Also, many local and interexchange carriers have created their own distinctive tones that signal callers when to input their calling card numbers.

50 Notice at ¶¶ 45-48.

administration[51] to preclude states from adopting CPP notification schemes based upon 1+ dialing or service-specific area codes.[52]

The Commission recently sought comments in its numbering resource optimization proceeding on the utility of service- or technology-specific area codes for CPP. In commenting in this proceeding, CTIA addressed in detail its concern with the discriminatory and anticompetitive nature of such numbering strategies generally. Telephone numbers are limited resources that should not be wasted for any purpose, including CPP. Given the availability of alternative, more effective notification methods, it makes little sense to squander limited numbering resources by employing inefficient CPP-specific area codes. In the long term, a distinctive tone should provide sufficient notice of the unique nature of the CPP call without resort to special telephone numbers.

B. Requiring That The Intercept Message Contain Detailed Information About Rates Is Potentially Misleading And Prohibitively Expensive.

CTIA objects to the Commission's proposal to disclose per-minute charges and other applicable fees such as roaming charges in the notification message.[53] The Commission has tentatively concluded "that rate information would be considered relevant by a substantial majority of calling parties -- common sense tells us that most people would be reluctant to undertake responsibility for paying for

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51 47 U.S.C. § 251(e)(1).

52 See Notice at ¶ 49 ("CTIA also argues that the Commission could use its jurisdiction over numbering to preempt states from establishing inconsistent numbering schemes as the basis for CPP notification at the state level.").

53 See id. at ¶ 42. Notably, the Commission wants the notification message to disclose "all of the additional charges billed by the CMRS provider to the calling party for the call," including per minute charges to terminate airtime, and roaming and long distance fees. Id. at ¶ 43.

the call without some information about the amount of the payment."[54] The Commission believes that "it may be the case that the provision of rate information would serve as an effective means to facilitate CPP, because calling parties would be more inclined to complete CPP calls than they might be if they were left to guess what they would be billed for the call, to the extent they would deem the quoted rate as reasonable."[55]

As noted in CTIA's prior pleadings, providing a detailed list of relevant charges is needlessly complex as well as misleading. In many if not all cases, the intercept message will be unable to account for all charges associated with a CPP call, for example, wireline charges associated with originating and handing off CPP calls to the mobile carrier.[56] Any requirement to provide cost information would be incomplete at best, and misleading to the customer at worst.[57]

Moreover, adding specific rate information will necessarily lengthen the message. The longer the message, the higher the probability that callers will become frustrated and terminate the call prior to completion. As CTIA has previously established, the Commission recognizes the importance of

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54 Id.

55 Id.

56 No party has disputed CTIA's declaration that providing incomplete pricing information, which is inevitable in a CPP environment, is harmful to consumers. Comments of CTIA in CC Docket No. 97-207 (filed Dec. 16, 1997).

57 The Commission has only required that intercept messages include specific cost information in those limited cases where there existed a record of significant and persistent abuse by service providers (e.g., operator services and 900 pay-per calls). See Policies and Rules Concerning Operator Service Providers, *Report and Order*, 6 FCC Rcd 2744, 2746 (1991) ("OSP Report and Order"); Policies and Rules Concerning Interstate 900 Telecommunications Services, *Report and Order*, 6 FCC Rcd 6166 (1991) ("900 Report and Order").

minimizing the delay between call initiation and call completion.[58] To illustrate, in its implementation of number portability, the Commission rejected measures which would result in a 1.3 second call completion delay.[59] The Commission reasoned "that the time it takes to receive a call is an important factor for many subscribers. . . .'[60] Similarly, wireless subscribers would be harmed by regulatory obligations that create a delay in call completion and an increase in caller terminations.[61] Mandating specific pricing information in a CPP notification system would lead to such a result.[62]

The Commission's proposal that the notification message disclose relevant rates is similarly problematic because it assumes inappropriately that (1) any charges associated with a CPP call are immediately knowable to the CMRS provider and can be communicated instantly to a caller; and (2) that the imparting of this knowledge does not incur significant costs. In fact, not all charges can easily be predicted prior to the commencement of a CPP CMRS call. The mobile nature of CMRS calls at times can impair the ability of a carrier to disclose in real-time an accurate assessment of all charges for the call. By traversing county, state, or other geopolitical boundaries, a CMRS carrier may incur different

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58 As a measure of service quality, the Commission has consistently monitored dial-tone-delay in wireline networks. See ARMIS filing 43-06.

59 Telephone Number Portability, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 7236, ¶ 24 (1997) ("[W]e agree with AT&T that the studies submitted by petitioners fail to demonstrate that 1.3 seconds of post-dial delay is imperceptible to the public.")

60 Id. at ¶ 22.

61 See id. (In a discussion concerning the impact of call completion delay on businesses, the Commission noted that "[i]f the party making a call to a business experiences additional delay . . . that delay may negatively impact how the business is perceived. . . .")

62 The general notion that callers not be subjected to unreasonable dialing delays is codified in Section 251, 47 U.S.C. § 251(b)(3), in the requirement that LECs provide dialing parity.

assessments of regulatory fees or taxes that cannot be predicted at the time of the notification announcement.[63] CMRS customers do not file "flight plans" with their service provider -- there are no simple or accurate means to estimate or predict the total fees associated with certain calls in real time.

To further complicate matters, there are many variables associated with a typical call that may affect the total charge. For example, the CMRS provider may not be the only carrier imposing charges. Other charges, including IXC-imposed toll charges or message unit charges imposed by the caller's local carrier, may significantly raise the costs for calls to CPP subscribers. The charges assessed by these other carriers will not be known by the CMRS carrier, and therefore will not be available for inclusion in a rate notification message. In addition, the CMRS provider's charges may vary with the length of the call, the time of day of the call, and the subscriber's choice of service plan. Moreover, the billing method can be a significant cost factor. Thus, many factors will affect the cost of a CPP call. The Commission should not underestimate consumers; they should be entitled to make informed decisions without having to wade through a morass of unnecessary detail.

CMRS providers, through a brief educational intercept message, simply cannot provide callers with the exact charges for their calls.[64] At most, they can merely describe the potential charges that

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63 For example, in a multi-state CMRS market, some calls may be subject to the Commission's universal services charges while other, intrastate calls may be subject to different state-imposed charges.

64 Lengthening the intercept message to explain all possible charges, including foreseeable and unforeseeable charges, would, in effect, make the message impractical and useless. Simply stated, an intercept message that is too long and too complicated will lead to consumers hanging-up before the message has been completed. Moreover, a longer intercept message that includes the rates and other key provisions of the call may increase the overall costs of the call. See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Order on Reconsideration*,

could be assessed. This revelation would likely add considerably to the length of the call, and would have little practical value. The sheer multiplicity of factors make it impossible to provide the caller with completely accurate information as to the cost of the call prior to its completion. Requirements to provide general cost information, without regard to the particular call, would be incomplete at best, and at worst misleading to the caller.

C. Mandatory Disclosure Of Rate Information Is Premature Given The Lack Of Record Evidence Of Misleading Or Fraudulent Behavior On The Part Of CMRS Carriers.

The Commission's proposal that carriers disclose rate information in the notification message is also premature. The Commission's goal in this proceeding it to remove regulatory obstacles to the development of CPP. By requiring the disclosure of a carrier's rates and other fees, the Commission's attempt at consumer protection will likely have the paradoxical effect of impairing rather than enhancing competition and innovation. The Commission should not try to second guess a diverse, dynamic business such as CMRS. To do so risks potentially constraining the market and the development of competitive CPP pricing packages and options. Neither CTIA, the Commission, nor the CMRS industry can predict at this time the "killer" CPP application. Carriers may pass along certain charges but not others. They may have different fees for CPP for different packages, depending upon how costs are allocated between the caller and the called party. The market, not the Commission, should make these determinations.

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12 FCC Rcd 15014, ¶¶ 21, 33 (1997) (Commission acknowledged AT&T assertion that for dial-around services, a recorded message explaining key provisions, including rates, could delay call set-up by 1.5 to 2 minutes, and may increase the cost of the call by $0.33 to $0.77 per call) ("Dial-Around Reconsideration Order").

If problems develop, and consumers are being harmed, the Commission can intervene quickly to require the disclosure of per-minute rates, when feasible. But, it should not as a matter of law[65] and policy regulate against such problems in anticipation of their occurrence.

Notably, the Commission has required intercept messages to provide specific pricing information only in those limited cases where there existed a record of significant and persistent abuses by service providers. Specifically, the Commission required disclosure messages to include charges in the OSP and the 900 pay-per-call service context. Prior to the Telecommunications Act of 1996,[66] the Commission imposed upon operator service providers and 900 service providers the duty to disclose their charges because of evidence of prior abuses and the consequent need for consumer protection measures.[67] These service providers were notorious for charging excessive amounts for their services without prior notification of such charges.[68]

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65 See Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) (The Commission cannot enact regulation to remedy a non-existent problem).

66 In the 1996 Act, Congress amended Sections 226 and 228 which revised the Commission's statutory basis for regulating operator services and 900 pay-per-call services. 47 U.S.C. §§ 226, 228.

67 See OSP Report and Order at ¶ 2 ("In the NPRM, we proposed specific rules aimed at solving problems in the operator services industry that had persisted despite previous Commission action"); see also Billed Party Preference for InterLATA 0+ Calls, *Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 7274, ¶ 8, n.22 (1996) (noting that the Commission had received more than 5,000 complaints about operator service provider rates between August 1, 1994 and August 31, 1995, and that "[t]he rate of such complaints appears to be increasing."); 900 Report and Order at ¶ 2, n.2 (noting that since 1988, the Commission had "received approximately 4,300 complaints dealing with 900 services" and that they constituted the "most frequent topic of informal complaints to the Commission.").

68 See 900 Report and Order at ¶ 12 (concluding that "pay-per-call services have a significant potential for infringement of, and in fact are infringing, consumers' rights to make informed

By contrast, the CMRS industry has no such record of misconduct. There should be no expectation that the abuses that occurred in these other industries will materialize in the CMRS environment. CMRS providers already operate in a highly competitive environment. There is reason to believe that CPP will become a competitive service offering.[69] Because CPP is a means by which carriers can increase usage and promote efficient usage of available capacity, it is reasonable to expect that similarly low per-minute usage charges will be implemented for CPP.

D. The Commission Should Ensure That CMRS Carriers Can Achieve Binding Obligations With Calling Parties.

As the Notice suggests[70] it is important to ensure at the outset that any agreements reached between a CMRS provider and a calling party under CPP create binding obligations on both parties. Such considerations are especially crucial in the CPP environment as CMRS carriers will likely have no pre-existing relationship with the calling party. CTIA continues to believe that the Commission should adopt informational mechanisms at the Federal level to ensure privity of contract between CMRS carriers and the CPP caller. CMRS carriers choosing to offer CPP should be able to avail themselves of the traditional common carrier limited immunities from liability as well as the means to secure the enforceability of CPP charges.

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decisions about telephone calls that are billed at an amount often far greater than the transmission charge with which consumers are more familiar.") (emphasis added).

69 For example, a carrier's adoption of excessive CPP charges would likely discourage calls to CMRS customers, thereby reducing demand for the service. Moreover, CPP callers are likely to know the CMRS customer they are calling and would no doubt alert the subscriber about the charges. These complaints, in turn, would likely lead the CMRS subscriber to seek another service provider offering more favorable CPP terms.

70 See Notice at ¶ 50.

In the CPP environment, the Commission should adopt one of several notification possibilities. It may permit CMRS providers offering CPP services to file: (1) informational CPP tariffs, similar to those filed by 1+ dial-around services;[71] (2) model informational contracts pursuant to Section 211 that would be made available by the Commission to the public; or (3) special CPP service reports pursuant to Section 219 that would be made available by the Commission to the pubic for inspection.

An informational tariff filing under Section 203 with respect to CPP services presents several possible benefits which may outweigh the significant costs generally associated with tariff filing requirements. In the context of interstate, interexchange 1+ dial-around services, carriers were faced with directly analogous circumstances to CPP in that the charged party did not necessarily have a pre-existing relationship with the billing carrier. The Commission permitted permissive tariffing by dial-around carriers and:

> modified its rules to give carriers the option of filing tariffs for dial-around 1+ services (interstate, domestic, interexchange direct-dial services to which consumers obtain access by dialing a carrier's access code) because long distance carriers cannot reasonably establish enforceable contracts with casual callers in these circumstances.[72]

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71 See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Second Report and Order*, 11 FCC Rcd 20730, n.29 (1996). Similar to tariff filings of non-dominant interexchange carriers, including 1+ dial-around services, CPP tariffs should not be subject to prior Commission approval or review, should be presumed to be lawful, and should not require the filing of any supporting cost support data. CTIA would not support any CPP tariff filing obligations that would require cost justification by CMRS carriers, or would burden the Commission with prior approval requirements.

72 See Federal Communications News Release, "Commission Affirms With Minor Modifications Decision to Eliminate Tariff Filing Requirements for Long Distance Carriers," Report No. CC 97-46 (rel. Aug. 20, 1997); see also Dial-Around Reconsideration Order.

As with 1+ dialing services, it is infeasible in the case of CPP services to ensure that the calling party is quoted the correct charges and fees accurately and immediately.[73] This is directly analogous to the problem with 1+ dialing that necessitated the use of tariffs.

As an alternative to tariff filings, the Commission may reconsider in part its decision to forbear from applying Section 211 and permit CMRS providers to voluntarily file model CPP contracts which would be made available for public inspection.[74] Finally, the Commission's express authority under Section 219 to permit carriers to file special and other reports may provide an additional basis to ensure enforceable CPP contracts.[75]

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[73] With dial-around 1+ services, the Commission recognized that the interexchange carrier did not have the ability to distinguish a caller using dial-around 1+ services from direct dial 1+ services. Therefore, it could not accurately provide such callers with the rates, terms, and conditions of the call prior to its completion. Dial-Around Reconsideration Order at ¶ 33.

[74] Section 211(b) can be interpreted by the Commission to offer CMRS providers an alternative to tariff filings by allowing the Commission to require the submission of "any other contracts of any carrier." 47 U.S.C. § 211(b). The FCC has interpreted this statutory provision broadly, stating that "carriers and non-carrier customers can enter into contracts, agreements, and arrangements, and under Section 211 of the Act, 47 U.S.C. § 211, the Commission can require these documents to be filed when it deems necessary." See Competitive Carrier Services, *Sixth Report and Order*, 99 FCC 2d 1020 at ¶ 12 (1985).

[75] Specifically, Section 219(a) grants the Commission significant discretion to have carriers file reports containing "information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same, as the Commission may require." 47 U.S.C. § 219(a). Moreover, Section 219(b) grants the Commission authority by general or special order to have CMRS carriers providing CPP to file "periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act." 47 U.S.C. § 219(b). These congressional grants of authority can be interpreted broadly by the Commission to permit the filing of annual (or periodical) CPP service reports which, once publicly available, would disclose to potential CPP calling parties the key provisions and relevant limitations on the CMRS carrier's liability.

VI. THE COMMISSION SHOULD NOT REGULATE THE RATES CHARGED BY CMRS CARRIERS FOR CPP CALLS.

The Commission has raised a concern that there is no direct, competitive pressure on carriers to ensure that CPP callers obtain reasonable rates to complete a call. Citing regulatory experiences in the United Kingdom, it requests comments on whether market conditions exist or are likely to develop that would exert competitive pressure on CPP rates and whether it may be necessary to set the rates charged for CPP service.[76] The Commission should abandon as premature any further inquiry into the regulation of CPP rates.

A. The Commission Should Not Anticipate Market Failure.

The unprecedented nature of the Commission's inquiry into regulating CPP rates cannot be overstated. The Commission has never established the rates that CMRS carriers charge for their services; there is no history in CMRS regulation of Federal rate-of-return rate regulation.[77] It is inappropriate for the Commission to be concerned by and regulate for "bad actors" before CPP services are permitted the opportunity to develop. The aim of the Commission's inquiry into CPP is to remove regulatory obstacles -- not to anticipate and create additional regulatory obstacles to address nonexistent problems.

No one can demonstrate at this time that direct competitive pressures on CPP rates will fail to protect calling parties. For all anyone knows, competition in CPP service offerings may center around the reasonableness of the charge to the calling party. Carriers may compete for customers by

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[76] See Notice at ¶¶ 53-54; see also Separate Statement of Commissioner Susan Ness at 1-2 and n. 1.

advertising that they assess low CPP charges. Called party customers may opt to switch providers if one carrier charges more than another. Or a customer may elect not to subscribe to such a service in the first place. The only thing that is clear at this time is that if the Commission artificially constrains market development in anticipation of a problem that has not yet materialized, it will impair at significant expense the usual dynamics of the CMRS marketplace.

As the Commission recognizes,[78] it has no direct evidence that CPP pricing will in fact be controversial. While the Commission has significant latitude in adopting regulation in furtherance of the public interest, "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[79] As explained by Commissioner Furchtgott-Roth, the Commission should not even commence a line of inquiry on the need to regulate CPP rates. Rather, the

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[77] As a practical matter, the Commission lacks the information necessary to assess a carrier's underlying costs of providing CPP service, or the means to set an appropriate return on equity.

[78] See Notice at ¶ 54 (The Commission appears ready to defer regulation "until there is clear evidence that Commission action is necessary to resolve rate issues.").

[79] Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) (citation omitted) (emphasis added). Compare Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492, 7568 (Separate Statement of Commissioner Michael K. Powell, Concurring) (1999) ("It is critical to the process of regulators ceding control to the market that enforcement not become a solution in search of a problem that has not yet been *identified*. Neither should we suggest that we do not *need* a problem to solve in order to justify imposing additional regulatory burdens on market participants, simply because we believe those requirements may benefit consumers.") (emphasis in original); id. at 7567 ("enforcement must be targeted so that government intervenes -- only when and only to the extent -- the record demonstrates that there are real, identifiable harms that the market participants' voluntary actions will not correct.") ("Truth-in-Billing Order").

Commission should "take action only if credible evidence emerges once CPP has been launched that regulatory intervention is needed to protect consumers. . ."[80]

The Commission need not regulate CPP rates to avoid repeating the problems with gouging experienced in the payphone industry.[81] With calls from payphones, neither the calling nor the called party necessarily has a pre-existing relationship with the OSP. By contrast, with CPP the called party has an ongoing service relationship with the CMRS provider that gives it the ability to object to and otherwise influence the rate charged by the CMRS provider for incoming calls. In all likelihood, the called party will be concerned if a calling party is overcharged. The Commission should not posit that CMRS subscribers will be indifferent to the charges paid by calling parties. Nor should it underestimate subscribers' ability to ensure (through their ability and demonstrated willingness to churn) that CPP charges remain competitive.

To the extent that the Commission is concerned about excessive charges, it should abandon its more intrusive proposals in favor of less restrictive alternatives such as carrier branding of CPP service.

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80 Notice, Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, at 1. Given the Commission's recent conclusions in its most recent report to Congress on the competitiveness of the CMRS industry, it is ironic that the Commission would raise this concern. Id. ("In our Fourth Report to Congress on competitive market conditions in CMRS, the Commission concluded that the mobile telephony market continues to make 'steady competitive progress,' noting the results of one study showing that the average price per minute of mobile telephone service has declined over 40% between the end of 1995 and the end of 1998.") (citation omitted).

81 See, e.g., Billed Party Preference for InterLATA C+ Calls, *Second Report and Order and Order on Reconsideration*, 13 FCC Rcd 6122 (1998).

Through branding, carriers' reputational concerns will undercut potential tendencies to gouge.[82] In this way, the Commission will ensure that the CMRS CPP market functions appropriately with a minimum of regulatory intervention.

Finally, if problems do arise, the Commission is not without effective remedies. Among other things, it can rectify occurrences of discriminatory or anticompetitive conduct through selective Sections 201 and 202 enforcement.[83] Given its ability to rapidly respond to any potential market problems, the Commission need not adopt rate regulation in the name of consumer protection. It may rely upon less drastic, more targeted, measures to promote consumer welfare consistent with the public interest if the need arises.

B. The U.K. Experience Regulating CPP Rates Is Inapplicable.

The Commission should assume nothing from the regulatory experience in the United Kingdom regarding CPP charges.[84] Notably, the U.K. experience has no direct bearing on the U.S. regulatory structure; it is barely informative, much less controlling.

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82 Unlike OSPs, CMRS providers regularly invest significant sums of money in advertising and other promotional endeavors designed to enhance market presence and generate goodwill.

83 Compare Truth-in-Billing Order at ¶ 19 (CMRS "providers remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202 of the Act, and our decision [not to apply all of the truth in billing regulation on CMRS] here in no way diminishes such obligations as they may relate to the billing practices of CMRS carriers."). The Commission's truth in billing regulations provide an additional basis for ensuring that consumers are not subject to fraudulent or misleading billing practices for CPP calls.

84 In 1996, the British Office of Telecommunications ("OFTEL") commenced an investigation into the price of calls to mobile phones following concerns by consumers that charges were excessive. On December 15, 1998, the Director General of OFTEL announced that he would order BT, Vodafone, and Cellnet to: (1) cut the cost of calls from a BT line to Vodafone or Cellnet mobile phones by 25%; and (2) stop charging for unanswered and diverted calls. This

There are numerous reasons why the regulatory experience in the U.K. is of limited utility in this instance. Notably, in the U.K., there was evidence of inappropriately high retention (profit margin) by BT for wireline-to-wireless calls, and excessive call termination charges by Cellnet and Vodafone. These findings ultimately led to rate reductions in the charge assessed for calls to mobile phones. The U.K. government intervened only after several years of investigation, and only after developing record evidence of inappropriate behavior. Conversely, in the U.S., rate regulation is being proposed as an innoculative measure with no evidence of misconduct. This proposal fails to consider adequately the significant costs associated with traditional rate-of-return/price cap rate regulation that underlies the U.K. experience.

In addition, in the U. K., the market structure is significantly different from the U.S.; the U.S. has a significantly larger number of wireless competitors. In the U.K., there are only 4 mobile services licensees, each with a nationwide license.[85] By contrast, in the U.S., the industry structure is much more diverse. Licenses are local or regional in nature, based upon geographic areas such as MTAs, BTAs, MSAs, and RSAs. There are 2 cellular carriers, up to 6 broadband PCS carriers, and 1-2 digital SMR carriers in a given geographic market. There are CMRS carriers with national footprints, regional footprints, and purely local footprints. In fact, in the U.S., 169.9 million Americans now have five or

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decision followed an investigation by the Monopolies and Mergers Commission ("MMC") which concluded that "charges were much too high." Calls to Mobile Phones to be Reduced by 25%, 80/98, OFTEL, Office of Telecommunications, (Dec. 15, 1998). OFTEL adopted the MMC recommendations that the companies' licenses be modified "to reduce and control the charges they may make for calls to mobile phones up to March 2002." Id.

85 See, e.g., Prices of Calls To Mobile Phones, OFTEL, Office of Communications, ¶ 2.1 (Mar. 1997) (located at <http://www.oftel.gov.uk/pricing/call2mob.htm>) ("Calls To Mobile Phones").

more wireless providers available to them. As a result, wireless consumers in the U.S. have multiple service options, and multiple service providers from which to choose. Indeed, more than 24 percent of wireless consumers exercise their freedom to choose every year by changing carriers.[86]

Moreover, the pricing structures for U.K. and U.S. telephone calls are different. In the U.K., CPP is the norm. Residential customers are accustomed to paying for all local calls that they make,[87] whether to a wireline or a wireless phone. As a result, they receive no special distinctive tone or other notice that there will be a charge associated with the call. Nor is there any special notice in the caller's bill. In fact, consumers often are unaware that they are even calling a mobile phone. A survey for OFTEL in 1995 showed that only about 10% of consumers recognized that they were calling a mobile phone number and paying a premium price.[88] By contrast, in the U.S., as part of CPP offerings, callers will be notified that there will be a charge associated with a call. Inherently, U.S. callers will be better informed, better equipped consumers.[89]

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86 See e.g., "Churn & ARPU Stats Stabilizing – Somewhat," Wireless Market Stats," Paul Kagan Associates, Nov. 25, 1998, at 6; see also "Fierce Competition in Wireless Markets Causes Shift in Customer Satisfaction," PR Newswire, Sep. 22, 1998 (reporting 30 percent of surveyed wireless consumers say they may switch providers over the next twelve months, with price a major motivator, and CPP as an important feature that would cause more consumers to change carriers).

87 Calls To Mobile Phones at ¶ 2.5.

88 See OFTEL's Submission to the Monopolies and Mergers Commission inquiry into the prices of calls to mobile phones, OFTEL, Office of Telecommunications, ¶ 2.2 (May 1998) (located at <http://www.oftel.gov.uk/pricing/mmc0598.htm>).

89 Notably, the MMC while admitting that market forces might produce competitive pressures on charges in several years, concluded that it should set the termination rate for several years. It specifically declined to use market-based measures such as recorded intercept messages or publication of termination rates.

Furthermore, CPP service will be optional in the U.S. -- for both carriers and consumers. If consumers are dissatisfied, they can elect not to participate. In the U.K., however, CPP is not optional. As a result, consumers are more vulnerable to noncompetitive pricing by CMRS providers for CPP.

Finally, the regulation of the U.K. and the U.S. mobile phone industries varies significantly. At this time, all mobile service providers in the U.K. are subject to stringent rate regulation based upon a traditional monopoly model cost-of-service regulatory approach. U.K. regulatory bodies engage in significant inquiries into the costs associated with providing, for example, call termination services. Costs for termination charges are assessed according to a long run incremental cost model. U.K. mobile carriers are entitled to earn a minimum rate of return on their investment determined by the government.[90] In short, mobile carriers in the U.K. are subject to more regulation now than has ever been imposed on the U.S. wireless industry, even when there were only two cellular carriers in each market. Imposing the U.K. regulatory structure on the dynamic U.S. CMRS industry will generate little benefit, but will impose significant oversight and compliance costs.

VII. THERE IS NO NEED AT THIS TIME FOR THE COMMISSION TO REQUIRE LECS TO PROVIDE CPP BILLING AND COLLECTION SERVICES.

As CTIA has maintained consistently, the provision of CPP service does not automatically require the Commission to exercise jurisdiction over billing and collection.[91] It is premature to assume

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90 See, generally, Cellnet and Vodafone: Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Cellnet and Vodafone for terminating calls from fixed-line networks, Monopolies and Mergers Commission (Dec. 1998) (located at <http://www.oftel.gov.uk.pricing/ccmc1298.htm>); Prices of calls to mobile phones -- Statement, OFTEL, Office of Telecommunications (Mar. 1998) (located at <http://www.oftel.gov.uk.pricing/ctm0398.htm>).

91 See Notice at ¶¶ 55-68.

that CPP services cannot develop without access to LEC billing and collection services. Rather, what is now necessary is for a CMRS carrier to receive access to key information from LECs so that the carrier itself can bill and collect for CPP service. Section 251(c)(3) of the Communications Act[92] obligates incumbent LECs to provide requesting telecommunications carriers, on an unbundled basis, with sufficient information to do their own billing and collection.[93] The Commission should ensure that CMRS carriers have access to such necessary data so that they may bill and collect from CPP callers.[94] Depriving access to this core billing information would impair the ability of a CMRS carrier to provide CPP services.[95] Therefore, by law, ILECs should be required to provide such access to this key information as a means to foster CPP development and otherwise promote competition. [96]

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92 47 U.S.C. §251(c)(3).

93 The definition of "network element" in 47 U.S.C. § 153(29) includes "information sufficient for billing and collection."

94 See Notice at ¶ 66 (citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Second Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-98, 95-185, FCC 99-70 (rel. Apr. 16, 1999)); see also FCC News Release, "FCC Promotes Local Telecommunications Competition; Adopts Rules on Unbundling of Network Elements," Rep. No. CC-9941 (Sep. 15, 1999) (requiring that ILECs must provide unbundled access to operations support systems).

95 See 47 U.S.C. § 251(d)(2)(B).

96 In addition, prior to the Telecommunications Act of 1996, the Commission determined that billing, name, and address ("BNA") was a Title II common carrier service, access to which other interstate common carriers were entitled. Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, *Second Report and Order*, 8 FCC Rcd 4478 (1993).

VIII. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission act quickly to remove regulatory barriers to wireless carrier provision of CPP services consistent with the proposals made in these Comments.

Respectfully submitted,

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